United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7532

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IN THE MATTER OF

Docket No. 75-7532

AIRSPUR CORPORATION, [illegible]t/a
AIRSPUR, NEW YORK, Bankrupt.

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APPELLANT'S BRIEF

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Statement of the Case

The Order Appealed From

Appellant Jerome Lipper as Trustee in Bankruptcy of Airspur Corporation (the "Trustee") appeals from the order of District Judge Charles H. Tenney dated August 6, 1975 ("the August 6 order")(316 a) reversing a decision and order of Bankruptcy Judge Roy Babitt dated August 29, 1974 ("the August 29 order")(301a) which held that the Bankruptcy Court had summary jurisdiction over offsets and counterclaims asserted by the Trustee against certain claimants.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of	:	Docket No. 75/7532
AIRSPUR CORPORATION, a/k/a AIRSPUR NEW YORK,	:	
Bankrupt.	:	

APPELLANT'S MEMORANDUM

Preliminary Statement and Issues Presented

Appellees, part of a group which had financed the bankrupt, filed claims (1a, 90a, 128a, 150a)* in the Bankruptcy proceeding for monies due on notes issued to them by the bankrupt. The Trustee in Bankruptcy filed counterclaims and offsets against the appellees (56a, 103a, 142a, 156a) averring that the agreements which gave existence to the notes also transferred control of the bankrupt to the appellees, thereby making appellees liable for various

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* References are to pages in the Appendix.

acts and omissions resulting in the demise of the bankrupt, including conspiracy, fraud, negligence and breach of contract.

The claimants (appellees) then moved for dismissal of the counterclaims and offsets (174a, 180a, 263a, 279a) asserting that the counterclaims and offsets were not within the subject matter summary jurisdiction of the Court as not arising from the same transactions or series of transactions as the claims. The Trustee asserted that the claims and the counterclaims and offsets had their genesis in a common transaction and were therefore subject to the summary jurisdiction of the Bankruptcy Court.

Bankruptcy Judge Babitt, by decision and order dated August 29, 1974 (301a) sustained summary jurisdiction. Claimants appealed the denial of their motions and District Judge Tenney, by order of August 6, 1975 (316a) reversed the order below.

The issue thus presented is:

> Did the District Judge err in ruling, contrary to the findings of the Bankruptcy

Judge, that the Trustee's counterclaims and offsets did not arise from the same transaction or series of transactions as the one underlying the claims, thereby denying jurisdiction of the counterclaims and offsets to the bankruptcy court?

RELEVANT FACTS

In November 1968, Warren E. Kraemer and B.V. Brooks formed Airspur Corporation (the "Bankrupt") for the purpose of engaging in commuter airline service.

Subsequently, in need of financing, they entered into negotiations with a consortium to obtain the needed monetary infusion. This consortium consisted of nine parties of whom three are Appellees. [1,2,3*]

As of July 24, 1969, two interrelated agreements were executed, which formalized the joint ventures between the bankrupt and the appellees (5 a, 45 a), which provided, inter alia:

(a) for the purchase by appellees of 125,000 shares of the common stock of bankrupt at $10 per share,

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* The number references are to items of the Addendum to the Brief beginning at p. 29 infra.

which would then give appellees 50% of the resulting issued and outstanding stock of the bankrupt;[4]

(b) the loan of $3,750,000 by appellees in exchange for the issuance of 8% notes (the "notes");

(c) the election of three designees of appellees to the Board of Directors in order to give appellees control of 50% of the Board membership;

(d) the transfer to appellees of substantial management prerogatives including the right to ratify or approve any contract or act submitted for approval by the Board of Directors to the shareholders.

Less than one year later, on June 30, 1970, Airspur filed a petition seeking an arrangement under Chapter XI of the Bankruptcy Act, Sections 301 et seq., 11 U.S.C. §701 et seq., and was shortly thereafter adjudicated a bankrupt.

Appellees filed claims in the bankruptcy proceeding for money advanced under the agreements of July 24, 1969 and the notes arising therefrom.[5]

Appellant, the trustee in bankruptcy, upon investigation of the affairs of the bankrupt, discovered what

the Bankruptcy Judge later characterized as ". . . this curious sequence of business judgments, . . ." (308a), which resulted in the dissipation by the bankrupt of six million dollars of assets in less than one year. Among the transactions contributing to this bizarre circumstance were:

(a) the purchase of a moribund airline for $3,500,000 (a sum equal to over 50% of the Bankrupt's assets) without meaningful investigation;

(b) the granting of an unsecured loan of $1,000,000 to the financially unsound International Jetstream Corporation ("IJC"), of which K.R. Cravens, deceased, an active promoter of Airspur, was a director;

(c) the purchase from IJC of three Jetstream aircraft for an additional $1,395,000; and

(d) the deposit of $92,000 with the Handley Page Co. of England, a company which had twice been in bankruptcy and for which Warren Kraemer, a promoter of bankrupt, operated an agency in the United States, and for whom Cravens Company had been the exclusive distributing agent.

These acts, which led directly to the demise of the bankrupt, were all approved by the bankrupt's Board of Directors, including those members acting as designated agents of appellees. Indeed, none of the acts resulting in asset dissipation could have been approved without their concurrence. Appellees received notice thereof and did not check or act as reasonable parties would in their own business and did nothing to prevent their occurrence. The Trustee's inescapable conclusion was that appellees had been guilty of and were liable for the acts of their agent designees on the Board of Directors, and also individually for breach of contract, acts of gross mismanagement, negligence, conspiracy, fraud and misfeasance, all of which constituted breaches of their respective obligations deriving from the agreement of July 24, 1969. Accordingly, the trustee filed counterclaims and offsets against appellees, alleging the foregoing.[6]

The Assumption of Control of the Bankrupt by Appellees and Their Purchase of 50% of Bankrupt's Common Stock were the Quid Pro Quo for the Extension of Credit to Bankrupt and Therefore Constituted One Basic Transaction

Both courts below agreed that if the transaction between the bankrupt and claimants was integrated (arose out of the same transaction or series of transactions), then summary jurisdiction would lie. This is based upon the overwhelming weight of authority which holds that the claimant is deemed to have consented to the Court exercising jurisdiction over any counterclaims which the Trustee may assert arising out of the same "subject matter" or "transaction" as the claim.

This rule extends to separate disputes arising from the same contract. It is presently the law in this Circuit as well as the Third, Fourth, Eighth, Ninth and Tenth Circuits. Chase Nat. Bank v. Lyford, 147 F. 2d 273 (2d Cir. 1945); In re Solar Mfg. Corp., 200 F 2d 327 (3d Cir. 1952), cert denied sub. nom.; Marine Midland Trust Co. v. McGirl, 345 U.S. 940 (1953); Florance v. Kresge, 93 F. 2d 784 (4th Cir. 1938); Columbia Foundry Co. v. Lochner, 179 F. 2d 630 (4th Cir. 1950); Floro Realty &

Investment Co. v. Steem Elec. Corp., 128 F.2d 338 (8th Cir. 1942); Peters v. Lines, 275 F.2d 919 (9th Cir. 1960); Inter-State National Bank v. Luther, 221 F.2d 382 (10th Cir. 1955), appeal dismissed, 350 U.S. 944 (1956); In Re Seatrade Corp., 297 F.Supp. 577 (S.D.N.Y. 1969); In Re Petroleum Conversion Corp., 99 F.Supp. 899 (D.Del. 1951), aff'd, 196 F.2d 728 (3d Cir. 1952), cert denied sub. nom. Vaughn v. Petroleum Conversion Corp., 344 U.S. 917 (1953); In Re Mercury Engineering Co., 60 F.Supp. 786 (S.D.Calif. 1945); In Re Gillespie Tire Co., 54 F.Supp. 336 (W.D.S.C. 1942).*

The issue then, and the point of departure between the two courts, was the District Judge's failure to agree that the loans by the appellees which resulted in the issuance of notes by the bankrupt (which notes were the

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* In Re Majestic Radio and Television Corp., 227 F.2d 152 (7th Cir. 1955), cert. denied sub. nom. Dwyer v. Franklin, 350 U.S. 995 (1956) heavily relied upon by appellees and the District Judge, is distinguishable from these cases since the counterclaim in that case arose from a "completely different subject matter" than did the claim. 227 F.2d at 156. The non-applicability of that case is discussed at p. 21 infra. B.F. Avery & Sons Co. v. Davis, 192 F.2d 255 (5th Cir. 1951), cert. denied 342 U.S. 945 (1952), also has been distinguished on its facts [see Peters v. Lines, 275 F.2d 919, 925 (9th Cir. 1960)], but, to the extent that it is not distinguishable, represents a distinctly minority view.

basis of the claims as filed) and the appellants objections, offsets and counterclaims arose out of the same transaction and further, the failure of the District Court to adopt the reasoning of the Bankruptcy Judge who found a logical and factual connection between the notes upon which claimants seek recovery and the underlying agreement which gave rise to those notes.

We respectfully submit that the District Judge ignored the substance of the transaction and adopted the form. As stated by Judge Babitt in his opinion, (310 a)

> "The word 'transaction' must not be construed so narrowly as to signify only a single isolated event. Rather, 'transaction' is a word of flexible meaning; it may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1926)."

The Transaction of July 24, 1969

On July 24, 1969, the claimants and the bankrupt met for the purpose of executing the documents necessary to effectuate their common purpose. That purpose, by the very terms of the writing evidencing it, was accomplished in two simultaneous stages, the execution of an agreement

designated Agreement Among Shareholders, and one designated Purchase Agreement.

These agreements (which for purposes of this discussion includes all subsidiary documents such as the notes) memorialized the purchase by the claimants of 50% of the stock of the bankrupt for $1,250,000, the loan of $3,750,000 to the bankrupt, the transfer of management and financial controls to the claimants, the election of three designees of claimants to the bankrupt's Board of Directors, the grant of power to the claimants to annul any transaction of the bankrupt or the Board of Directors, and the concomitant assumption by the claimants of the corollary obligations and responsibilities naturally flowing from their demand for and assumption of control.

This all inclusive arrangement was intended to and in fact did constitute a complete surrender of autonomy by the bankrupt to the appellees and tied such control to appellees status as noteholders and not necessarily shareholders.

Thus, we find that the Purchase Agreement in Section 4.06 entitled "Conditions of Purchase" (11 a) stated the following condition precedent to its execution:

"SECTION 4.06. At or prior to the Closing Date there shall have been executed and delivered an Employment Agreement substantially in the form of Exhibit D attached hereto and incorporated herein by reference between Warren E. Kraemer and the Company (hereinafter called the "Employment Agreement") and an agreement among the Company, all of the present stockholders of the Company and the Purchaser, substantially in the form of Exhibit E attached hereto and incorporated herein by reference (hereinafter called the "Stockholders Agreement"). (Emphasis added.)

Clearly, the assumption of control by claimants was an essential quid pro quo for the stock purchase and loan. These events would not have occurred absent the transfer of control. Indeed, the Stockholders Agreement was "incorporated herein by reference . . .", an absolute statement of the intersependence of all facets of the transaction. Section 5.04[7] further evidences the degree to wich claimants, as noteholders, and not necessarily shareholders, assumed management functions.

Further indications of the total interrelationship of the two agreements appear in Section VII - "Events of Default", particularly subsections (e) and (k) (17a, 18a), which state:

"In case of the happening of any of the following events (herein sometimes called "Events of Default")"

* * *

"(e) default in the due observance of performance of any other covenant, condition or agreement on the part of the Company to be observed or performed pursuant to the terms hereof and such default to the Company by any Purchaser or Purchasers holding at least 10% of the principal amount of the Notes at the time outstanding;"

* * *

"(k) The Group A Stockholders (as defined in the Stockholders Agreement), or the Company, or any new Stockholders becoming a party thereto after the date thereof shall breach any of the provisions of the Stockholders Agreement"

It is particularly noteworthy that subsection (k) explicitly defines breach of the Stockholders Agreement as breach of the Purchase Agreement. That is precisely the position asserted by the Trustee.

Recourse to the Agreement Among Stockholders is even more revealing of the intent of the parties. Portions of the preamble (49 a) state:

"WHEREAS the Stockholders identified at the foot hereof as "Group B Stockholders" (hereinafter collectively called "Group B Stockholders") have agreed to purchase an aggregate of 125,000 shares of Common Stock (shares of Common Stock from time to time owned or held by Group B Stockholders being hereinafter

called "Group B Stock") and $3,750,000 aggregate principal amount of 8% Notes (hereinafter called the "Notes") of Airspur (said Group B Stockholders as holders of the Notes being hereinafter called the "Noteholders") pursuant to a Purchase Agreement, dated as of July 24, 1969, among Airspur and the Group B Stockholders (hereinafter called the "Purchase Agreement");

"WHEREAS the Group B Stockholders wish to impose certain controls over Airspur as a condition to their investment in Airspur through the purchase of the Group B Stock and the Notes and it is a condition to the obligations of the Group B Stockholders to make such a purchase that this Agreement shall be duly executed and delivered by the parties hereto; and

"WHEREAS it is deemed to be in the best interests of Airspur and the Stockholders that provisions be made for continuity and stability of policy for Airspur and, to that end, that the Group A Stockholders and the Group B Stockholders share equally in the management of Airspur and the control of its policy to the extent and upon the terms and conditions herein stated, and that the Group A Stockholders be restricted in their power to sell Group A Stock;"

The very first clause of this agreement exemplifies the totality of control and the assumption of this control by the Noteholders (50 a).

"1. (a) Unless the prior written consent of at least a majority of the shares of the Group B Stock held by Group B Stockholders who are also Noteholders at the time outstanding shall have been obtained by Airspur, the

> Stockholders shall vote whether directly or by written consent all the shares of Common Stock owned or held by them against any proposal . . .(iii) to approve or ratify any contract or act submitted for approval by the Board of Directors of the Company to the Shareholders of the Company." (Emphasis added.)

The trustee's counterclaim specifically alleges that notice was given by the bankrupt to the appellees as to various transactions contemplated or completed by the Board of Directors, and asserts the responsibility of the appellees for such actions by virtue of their fraud, conspiracy and neglect. Bankruptcy Judge Babitt recognized the effect of the control clauses when he stated:[8]

> "In effect, they [appellees] became co-managers of the corporation."(313a)

The Trustee charged that appellees failed to exercise their obligations to check, investigate or monitor the actions of their designees and the officers of the bankrupt and were so neglectful as to cause the resulting damage to and insolvency of the bankrupt.[8]

Paragraph 8 (54 a), it is important to note, ties the termination of the shareholders agreement to payment of the Notes.

> "8. This Agreement shall terminate on the later of (i) the payment of all principal and interest due under the Notes or (ii) the expiration of three years from the date hereof."

What transactional circumstance could be more demonstrative of a single transaction or related series of transactions?

We have agreements:

(a) specifically incorporating each other by reference in a multitude of ways;

(b) executed simultaneously;

(c) making the execution of one a condition precedent to the execution of the other;

(d) making status as a Noteholder essential to exercise of control; and

(e) as a totality, encompassing the entire transaction between the parties.

To reason, as did the District Judge, that the Trustee has not objected to the notes in his counterclaims is to assume a formalistic posture that belies the reality of the events which occurred. The Trustee has clearly and unequivocally objected to the claims that were filed, he has claimed a breach of the very agreement which gave

existence to the notes and he has objected to a windfall to those very claimants who contributed so substantially to the demise of the bankrupt and the rape of its creditors. The Trustee's position is consistent with a line of cases which have held that separate disputes originating from the same transaction will be heard together in the Bankruptcy Court where placed in issue there.

In upholding summary jurisdiction, the appellate tribunals relied upon the leading case of Alexander v. Hillman, 296 U.S. 222 (1935), a case which on its facts as well as the law, is particularly instructive in the present situation.

In Hillman, an equity receivership case, certain officers and directors of the corporation in receivership filed claims with the receiver for salaries and fees for services rendered. The receivers counterclaimed, charging fraud and mismanagement in the claimants' stewardship of the corporation, and demanded affirmative judgment far in excess of the amount of the original claim. The Supreme Court, reversing a lower court order denying jurisdiction over the counterclaim, held the filing of the claim by claimants a consent to the exercise of jurisdiction by the court

over the counterclaim.

A court of equity, the High Tribunal reasoned, once having the parties before it, "will decide all matters in dispute and decree complete relief." 296 U.S. at 242. To require the receivers to proceed separately against the claimants "would introduce additional elements of uncertainty and would involve unnecessary delay, work and expense." Id. at 243. Therefore, the Court concluded, "unquestionably, all matters in the controversies between the parties may be tried and determined more conveniently and promptly in the receivership court than elsewhere." Ibid.

In applying the Hillman doctrine to bankruptcies, the courts have consistently construed it broadly, so as to accomplish its important procedural goals of expeditious and economic judicial administration of estates. Thus, it is basic doctrine that separate disputes having their genesis in the same contract will be heard together in the Bankruptcy Court where placed in issue there. Having derived from the same agreement, "both [disputes] clearly arose from the same transaction." Peters v. Lines, 275 F. 2d at 925-26.

In the leading case of Florance v. Kresge, 93 F. 2d 784 (4th Cir. 1938), the court held that where a claimant sought to recover rent and commissions under a contract, a counterclaim relating to the wholly separate question of division of profits under the same contract could be asserted in the Bankruptcy Court. Commenting on the decision, Colliers observes:

> "In the light of expeditious administration of bankrupt estates, and avoidance of multiplicity of litigation, this decision has much to recommend it. It would further serve to reduce the operation of the 'absurdity of making A pay B when B owes A.' " 4 Colliers on Bankruptcy, §68.20 (14th ed.), pp. 949-51.

In re Solar Manufacturing Corp., 200 F. 2d 327 (3rd Cir. 1952), cert. denied sub.nom. Marine Midland Trust Co. v. McGirl, 345 U.S. 940 (1953) adopted a like approach and further extended Hillman when it held that a bank's claims on a promissory note and for commissions as trustee, enabled the bankruptcy trustee to maintain a counterclaim charging breach of trust and misfeasance, since both the claim and counterclaim arose from the same agreement.

In re Seatrade Corp., 297 F. Supp. 577 (S.D.N.Y. 1969), illustrates the recent application of Hillman in this

District and demonstrates, at the same time, the a fortiori applicability of the Hillman doctrine to the facts of the instant case. There, an insurance carrier filed a claim in bankruptcy for unpaid insurance premiums. The trustee counterclaimed and demanded affirmative judgment, seeking reimbursement for unrelated claims and attorneys fees paid by the bankrupt with its own funds, but allegedly covered under the insurance policy. The Court, in upholding jurisdiction over the counterclaim, ruled that since the disputes arose from the same document, to wit, the insurance policy, consent to the counterclaim was properly implied.

Like consent is more readily implied in the instant case. Appellees have claimed against the Bankrupt pursuant to promissory notes issued to them as part of a stock purchase and shareholders' agreement into which they had entered on July 24, 1969. In another part of the same agreement, moveants undertook to "share equally in the management of Airspur" and nominated directors to accomplish this purpose.

It is the essence of the Trustee's counterclaim that the appellees breached the very agreement under which they now claim in this bankruptcy, by so woefully failing

to perform their management duties that their breach led to Airspur's demise. It is, moreover, in part, the very monies which appellees seek to recover that the Trustee charges were dissipated by virtue of their breach.

The close relationship between the claim and the counterclaim as previously demonstrated, is too apparent to require extended discussion. If Florance, Solar and Seatrade have any force, the conclusion is compelled here that the claim and counterclaim dealing as they do with the same "subject matter" and arising as they do from the same "transaction" are both subject to the jurisdiction of the Bankruptcy Court.

> "Far more expeditious use of the judicial system prevails when controversies arising out of the same transaction are determined in one action than separate actions." Peter v. Lines, 275 F. 2d at 925.

> The Claims and the Counterclaims Arose out of the Same Transactions or Series of Transactions. Therefore, the Bankruptcy Court had Summary Jurisdiction

As Bankruptcy Judge Babitt stated in sustaining jurisdiction (313a):

"By entering into the agreements of July 24, 1969 the claimants became far more than me creditors of Airspur; they became, as set forth above, its owners and managers of its business affairs as well . . . In effect, they became co-managers of the corporation.[4] Moreover, the agreement also gave the Class B shareholders the right to give their seal of benediction to all of the contracts and other actions entered into or taken by the directors . . .sought all the benefits of managerial authority with none of the concomitant responsibilities imposed by that status. To say that the Class B Shareholders entered into the agreement solely to exercise controls over Airspur and then to contend that, having been granted those controls, those shareholders were not parties to Airspur's parlous and ill-fated business transactions is fatuous. With authority must go responsibility, and the claimants cannot grasp the benefits of the former and simultaneously reject the burdens of the latter. By entering into the agreements the claimants became significant forces in the management of Airspur; and, as such, they are properly here for disposition by this court of the trustee's counterclaims. . ." (footnote omitted.)

The District Judge took the position that the conclusion of the Bankruptcy Judge was unwarranted by the case law. Yet, the District Judge, on this particular principal of law, cited only one case in support of his position; In Re Majestic Radio & Television Corp., 227 F.2d 152 (7th Cir. 1955). This case, correct in its holding, is

entirely inopposite to the case at bar. In Majestic, a former director of the bankrupt filed a claim based on goods sold and delivered to the bankrupt. The Trustees filed a counterclaim based on allegations of violations of fiduciary duty. On appeal, the Seventh Circuit held that summary jurisdiction of the counterclaim was improper.

The District Judge here treated Majestic as being analagous to the case at bar, which it patently is not. In Majestic, there was no transactional relationship at all between the claim and the counterclaim, the only asserted ground for jurisdiction being the filing of the claim.

In this case, the Trustee's counterclaims are founded on the very agreement which created the claims, the agreement of July 24, 1969, which created the notes and the various obligations appellees have breached.

The District Judge treats the agreements of July 24, 1969 as two unrelated contracts, when by their express terms, they constitute one transaction. It is clear that the execution of one without the other would not have constituted the transaction bargained for by either the

bankrupt or the appellees. The money would never have been loaned, and the notes never issued had not the required controls been given to appellees.

Furthermore, the District Judge misconceives the nature of the Trustee's claim. He completely ignored the totality of the transaction and treated the purchase agreement as being separate, a conclusion which ignores the realities.

The charges against the appelleescontained in the counterclaims do not exist in a vacuum. They could only arise by virtue of the status of control persons assumed by the appellees under their agreement. The appellees bargained for and obtained for themselves the right to full control of the operations of the bankrupt. Having done so, they automatically assumed the corollary obligations inherent in the management of any business - to use reasonable care and exercise informed business judgment.

To that extent, the Purchase Agreement was not an executed agreement as the District Judge maintained, but was executory with respect to those provisions providing for continuing responsibility.

To now allow appellees to carve out of their agreement that portion which is beneficial to them and assert it in the bankruptcy court while simultaneously permitting them to claim that their obligations arising under the same agreements are not assertable by the Trustee is unconscionable and in violation of their express undertakings.

Both Courts Below Having Found Summary Jurisdiction of the Cravens Claim to be Proper, Its Determination Should Remain in the Bankruptcy Court

Both the Bankruptcy Court and the District Court agreed that summary jurisdiction of the Trustee's counterclaims against Cravens was proper.

The District Court, however, took the position that the Bankruptcy Court ought to have declined jurisdiction in the exercise of discretion on the grounds that the matter would best be determined in the pending plenary action in the Supreme Court of the State of New York.

This position is not proper for two reasons:

(a) The Supreme Court action does not involve

all of the parties who filed claims in the bankruptcy proceeding, nor in fact, all of the named defendants in the State Court action, as the District Judge assumed, since the Trustee was not able to obtain jurisdiction of all in the State of New York.[9]

(b) Secondly, retention of jurisdiction in the Bankruptcy Court adds one very important element not present in the State Court and that is the power of the Bankruptcy Court to equitably subordinate claims.

Pepper v. Litton, 308 U.S. 295 (1939).

Rader v. Boyd, 252 F.2d 585 (10th Cir. 1957).

The Bankruptcy Court may find that even though a claim should be allowed, its priority rights ought tobe adjusted as a matter of equity between the given claimants and other claimants.

In circumstances such as exist in this case, the availability of that power argues strongly in favor of retention of jurisdiction in the Bankruptcy Court.

In order to determine whether subordination is appropriate, the Bankruptcy Court would need to conduct hearings, the substance of which will obviously be

duplicative of New York State Court hearings.

Additionally, it is evident that had the District Court found summary jurisdiction with respect to the other appellees, it would not have left the Cravens claim to be litigated in the State Court. Since the Trustee maintains that all of the claimants are subject to summary jurisdiction, the Cravens claim should remain in the Bankruptcy Court.

Issues Not Raised Below, or Raised but not Appealed From, Are Not Properly Before this Court

Appellee Ohio, in addition to its motion to dismiss, moved before the Bankruptcy Court for summary judgment on its claim. That motion was not decided by the Bankruptcy Judge and the District Court declined to deal with it de novo (328a, fn 2 & 4). Ohio did not appeal to this Court.

Appellee Bankers had raised an issue before the Bankruptcy Court concerning its status as a Trustee and the ability of appellant to claim against the trust estate for actions of the Trustee. The Bankruptcy Court did not decide that issue and Bankers did not raise it in its notice of appeal to the District Court.

Appellant therefore considers that neither the Ohio motion for summary judgment nor the Bankers arguments are matters before this Court.

For Purposes of a Motion to Dismiss, the Allegations of the Trustee's Counterclaims and Offsets Must be Taken to be True.

The Trustee's allegations contained in the objections and counterclaims must be taken as true in judging the propriety of a motion to dismiss. Stockwell v. Reynolds, 252 F.Supp. 215 (S.D.N.Y. 1965). Undoubtedly, the assertions by the Trustee should be construed liberally in his favor. Jenkins v. McKeithan, 395 U.S. 411 (1968). The counterclaims should not be dismissed unless it appears that the Trustee could prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957).

CONCLUSION

The Trustee's counterclaims and offsets clearly raise issues which have their origin in the transaction upon which appellee's claims are founded. The counterclaims therefore fall squarely within the subject matter jurisdiction of the Bankruptcy Court.

The decision of the United States District Court should be reversed.

Dated: New York, New York
November 10, 1975

Respectfully submitted,

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Attorney for Appellant
Jerome Lipper as Trustee
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Corporation, Bankrupt

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Addendum to Brief

1. The original consortium consisted of Chemical Bank as Trustee, Mercantile Commerce Co., Bankers Trust Company as Trustee, Ohio Real Property, Inc., the Diebold Technology Venture Fund, Inc., D.B. Glynn & Company, The Value Line Special Situations Fund, Inc., Raymond E. Rowland and Beechmont Company as Agent. Chemical Bank has since settled the Trustee's claim against it and is not part of this appeal.

2. The fourth Appellee is K.R. Cravens Corp., whose claim is not founded on the agreement of July 24, 1969, and is treated separately in this brief. Four other claimants have stipulated to be bound by the decision in this appeal.

3. For ease of treatment, the term "Appellees" when used in this memorandum, excludes K.R. Cravens Corp., except where otherwise indicated.

4. The original shareholders were designated as Group A shareholders and the appellees as Group B shareholders.

5. K.R. Cravens Corp., as assignee of International Jetstream Corp., filed for the alleged unpaid balance of purchase price in the sum of $370,768.84 claimed to be due and owing for the purchase of three aircraft.

6. Additionally, in order to obtain jurisdiction over certain parties who did not file claims in the bankruptcy proceeding, and only as a precaution and so alleged by the trustee to the court and in order to protect the estate in the event of a successful challenge to the jurisdiction of the bankruptcy court, the trustee initiated an action in the Supreme Court of the State of New York against claimants and twelve others,

alleging substantially those matters alleged in the counterclaims. That matter has been held in abeyance pending the disposition of the bankruptcy jurisdictional issue. Although sixteen parties were named as defendants, the Trustee was only able to obtain jurisdiction over twelve.

7. Section 5.04 (15 a) appearing under "Affirmative Covenants" (of the bankrupt):

> "SECTION 5.04. In the event that pursuant to Paragraph 3 of the Employment Agreement, Mr. Kraemer has obtained the consent of the new chief operating officer to enter into a contract similar to the Employment Agreement, the Company will not enter into such a contract without the approval of the holders of at least a majority in principal amount of the Notes then outstanding.

8. Section 1(b)(50 a) again ties together the Shareholders and Noteholders and refers to the sibling agreements.

> "(b) If the requisite number of Group B Stockholders who are also Noteholders shall deem a stock split necessary as provided in Section 8.07 of the Purchase Agreement, the Stockholders shall vote all shares of Common Stock owned or held by them in favor of such stock split."

Section 1(c) and (d) continue the pattern.

> "(c) At each annual meeting of stockholders of Airspur, (i) the Group A Stockholders shall have the right to nominate three of the directors (hereinafter called the "Group A Directors") to be elected at such meeting; (ii) a majority of the shares of the Group B Stock held by Group B Stockholders who are also Noteholders shall have the right to nominate three of the directors (hereinafter

called the"Group B Directors") to be elected at such meeting; and (iii) the Stockholders shall vote all shares of Common Stock owned or held by them in favor of the election of such six nominees."

* * *

"(d) If any vacancy shall occur on the Board between annual meetings of stockholders of Airspur for any reason whatsoever and a special meeting of stockholders of Airspur is called to elect a new director to replace such former director, then the following provisions shall apply:

"(i) if the former director was a Group A Director, then the Group A Stockholders shall have the right to nominate a successor director; and

"(ii) if the former director was a Group B Director, then a majority of the shares of the Group B held by the Group B Stockholders who are also Noteholders shall have the right to nominate a successor director."

"The Stockholders shall vote all shares of Common Stock owned or held by them in favor of the election of the successor director so nominated."

Paragraph 2 again refers to shareholders who are also Noteholders.

"2. Each Group A Stockholder hereby agrees not to sell or otherwise transfer any of the Group A Stock owned or held by it or him as long as any of the Notes are outstanding and unpaid in whole or in part unless such sale or transfer shall have been consented to in advance by a majority of the shares of Group

B Stock held by the Group B Stockholders who are also Noteholders."

Paragraph 7 refers to the simultaneous election of directors, including the slate representing the lenders.

"7. For purposes of this Agreement, the following present members of the Board shall be deemed to have been nominated by the Group A Stockholders and elected by the Stockholders, and the following present members of the Board shall be deemed to have been nominated by the Group B Stockholders and elected by the Stockholders:

Group A Stockholders	Group B Stockholders
B. V. Brooks	Leonard Andrews
Warren E. Kraemer	Joe Benning, Jr.
Jerry W. Ryan	Richard Mersinger

9. Those not involved in the New York State Court proceeding are Diebold Technology Venture Fund, Inc., D.B. Glynn & Company, The Value Line Special Situations Fund, Inc., Raymond E. Rowland & Beechmont Company. See Footnote 1. Of the named defendants, jurisdiction was not obtained over Grover Moore, Vernon Taylor and Edward W. Breed.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JONATHAN NEEDLE, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age, and resides at New York, New York.

On November 13, 1975, deponent served the within Appellant's Brief and Joint Appendix upon Cowan, Liebowtiz & Latman, P.C., Attorneys for Appellee Mercantile Commerce Company, 200 East 42nd Street, New York, New York 10017, by delivering a true copy thereof to Phyllis Reichman personally. Deponent knew the person so served to be the secretary to M. S. Cowan.

On November 13, 1975, deponent also served the within Appellant's Brief and Joint Appendix upon Lovejoy, Wasson, Lundgren & Ashtown, Esqs., Attorneys for Appellee K.R. Cravens, 250 Park Avenue, New York, New York by delivering a true copy to Lorraine Brisbin personally. Deponent knew the person so served to be the secretary to Daniel J. Sullivan, Esq. of the above-mentioned firm.

Jonathan Needle
JONATHAN NEEDLE

Sworn to before me this
13th day of November, 1975.

Steven M. Tarshis
STEVEN M. TARSHIS
Notary Public, State of New York
No. 31-4524906
Qualified in New York County
Commission Expires March 30, 1976

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STEVEN M. TARSHIS, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides in Essex County, New Jersey.

On November 13, 1975, deponent served the within Appellant's Brief and Joint Appendix upon White & Case, Esqs., attorneys for Appellee Bankers Trust Company, as Trustee, etc., 14 Wall Street, New York, New York, by delivering a true copy thereof to Robert Perkins, Esq. Deponent knew the person so served to be a member of the firm of White & Case.

On November 13, 1975, deponent also served the within Appellant's Brief and Joint Appendix upon Bigham, Englar, Jones & Houston, Esqs., Attorneys for Appellee Ohio Real Property, Inc., 99 John Street, New York, New York, by delivering a true copy thereof to Francis Goonan, Esq. Deponent knew the person so served to be a member of the above mentioned law firm.

Steven M. Tarshis
STEVEN M. TARSHIS

Sworn to before me this
13th day of November, 1975.

Jonathan H. Needle

JONATHAN H. NEEDLE
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-8108908
Qualified in New York County
Commission Expires March 30, 1976

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

STEVEN M. TARSHIS, being duly sworn, deposes and says that deponent is not a party to the action, is over the age of 18 and resides at Essex County, New Jersey.

On November 14, 1975, deponent served the within Appelant's Brief and Joint Appendix on Carter Ledyard & Milburn, Esqs., at Two Wall Street, New York, New York, by delivering a true copy thereof to Frank Fox personally. Deponent knew the person so served to be the Managing Clerk of said law firm.

Steven M. Tarshis

Sworn to before me this
14th day of November, 1975.

Jonathan H. Neidle

JONATHAN H. NEIDLE
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-8108908
Qualified in New York County
Commission Expires March 30, 1976

JONATHAN H. NEIDLE
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